83-1980

No. _____

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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT

OF THE UNITED STATES

October term, 1983

DEAN EDWARD LILLIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari

from the United States

Court of Appeals

for the Ninth Circuit Court

DEAN EDWARD LILLIE

Petitioner, pro se

P.O. Box 996

Ashland, Oregon

97520

60 pp

QUESTIONS PRESENTED

1. Whether 28 USC 636(a) and (b), the section of the Magistrates Act that permits a magistrate to decide issues that are dispositive of a criminal case, violate Article III of the United States Constitution and the Fifth Amendment to the United States Constitution.

2. Whether the enactment by Congress of 26 USC 7203 exceeds its constitutional authority to enact criminal laws in violation of the Tenth Amendment to the United States Constitution and thereby denying petitioner due process of law in violation of the Fifth Amendment to the United States Constitution.

3. Whether Magistrate Hogan of the United States District Court for the District of Oregon abused his discretion in denying petitioner's motion to withdraw his guilty plea, and whether Judge

QUESTIONS PRESENTED

continued

Frye abused her discretion in affirming Magistrate Hogan's decision without a de novo hearing.

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Petitioner, Dean Edward Lillie, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in United States of America vs. Dean Edward Lillie No. 82-60008 (November 22, 1983) and subsequent order of the Court of Appeals denying Petitioner's motion for rehearing filed February 21, 1983.

OPINIONS BELOW

The opinion of the Ninth Circuit court of Appeals is unreported but is attached as Appendix A. The Court of Appeals affirmed the decision of the United States District Court for the District of Oregon (Appendix C), and the decision of the Magistrate (Appendix D), which had denied Petitioner's motion to withdraw his plea to wilfully failing to file an income tax return.

Petitioner moved for rehearing in

the Court of Appeals which was denied (Appendix B).

JURISDICTION

Jurisdiction in the court to review a criminal case is conferred by 28USC 1254(1). The Court of Appeals for the Ninth Circuit entered its order and opinion on November 2, 1983. Petitioner moved for rehearing which was denied by the Ninth Circuit on February 21, 1984. This petition for Writ of Certiorari is filed within thirty (30) days of the entry of the order denying rehearing in accordance with Rule 20 of the Rules of the Supreme Court.

Questions presented for review

1. Whether 28USC 636(a) and (b), the section of the Magistrates Act that permits a magistrate to decide issues that are dispositive of a criminal case, violate Article III of the United States

Constitution and the Fifth Amendment to the United States Constitution.

2. Whether the enactment by Congress of 26 USC 7203 exceeds it constitutional authority to enact criminal laws in violation of the Tenth Amendment to the United States Constitution and thereby denying petitioner due process of law in violation of the Fifth Amendment to the United States Constitution.

3. Whether Magistrate Hogan of the United States District Court for the District of Oregon abused his discretion in denying petitioner's motion to withdraw his guilty plea, and whether Judge Frye abused her discretion in affirming Magistrate Hogan's decision without a de novo hearing.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Petitioner alleges that 28 USC 636

(a) and (b) violates Article III of the United States Constitution thereby depriving petitioner of due process of law pursuant to the Fifth Amendment to the United States Constitution.

28 USC 636 (b) (1):

"Notwithstanding any provision of law to the contrary----

(A) a judge may designate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted,

and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to

the magistrate with instructions."

Article III, Section 1.:

"The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office."

Fifth Amendment, in relevant part:

"... nor (shall any person) be deprived of life, liberty, or property, without due process of law;..."

2. Petitioner alleges that Congress exceeded its authority to enact criminal laws by passing 26 USC 7203 and violated the Tenth Amendment to the United States Constitution and deprived petitioner of due process of law pursuant to the Fifth Amendment.

26 USC 7203:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the

time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure.

Tenth Amendment:

"The powers not delegated to the United States by the Consti-

tution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. Petitioner alleges that the Magistrate and District Judge abused their discretion in not allowing petitioner to withdraw his guilty plea, for the reason that petitioner did not fully understand the maximum penalty in violation of the Rule of Criminal Procedure 11 (c) (1):

"Before accepting a plea of guilty or nolo contendre, the Court must address the defendant personally in open court and inform him of, and determine that he understands the following:

1) the nature of the charge to which the plea is offered, the

mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term;..."

STATEMENT OF THE CASE

Petitioner appeared before Magistrate Hogan and entered a guilty plea. Petitioner attempted to withdraw that plea bymotion because he then realized that he had failed to fully understand the maximum penalty of the crime to which he pleaded guilty based on false assurances by his attorney in violation of FRCP 11 (c) (1). Magistrate Hogan denied petitioner's motion which was affirmed by District Judge Frye.

Petitioner appealed the denial of the motion to withdraw his guilty plea to the Ninth Circuit Court of Appeals on

the grounds that 26 USC 7203 was enacted beyond the constitutional authority of congress, and that this Court lacked subject matter jurisdiction to enforce such a law. Also petitioner raised the issue of his failure to fully comprehend the maximum mandatory penalty and asserted that the United States has violated FRCP 11 (c) (1).

The Ninth Circuit entered its decision affirming the District Court. Petitioner moved for rehearing in the Ninth Circuit based on the unconstitutional use of a magistrate to enter final judgment in criminal cases in violation of Article III and the Fifth Amendment. The Court of Appeals denied petitioner's motion for rehearing.

REASONS FOR ALLOWANCE OF WRIT

1. Unconstitutionality of Magistrate's Act

A substantial federal question exists regarding the status of United States Magistrates following this Court's decision in Northern Pipeline Construction Company v. Marathon Pipeline Company, 458 U.S. 50 (1982), which held that Bankruptcy Court judges are not Article III judges and therefore Congress improperly delegated judicial function in violation of Article III.

A controversy is developing between the Ninth Circuit and the Third Circuit on the issue of the Article III constitutionality of 28 USC 636(c), the section of the Magistrate's Act that permits a final decision with consent by a magistrate. The Ninth Circuit in Pacemaker Diagnostic Clinic Inc. v. Instromedix, Inc., 712 F2d 791 (1983), ruled that magistrates may not make final decisions even with consent of

the parties because magistrates are not Article III judges and the defect is jurisdictional and not waivable.

The Third Circuit in Wharton-Thomas v. United States, _____ F2d _____ (No. 82-5555) (Nov. 23, 1983), reached the opposite conclusion and held that 28 USC 636 (c) was not unconstitutional.

Petitioner's case is not a civil case. However, the use of magistrates in criminal cases is controlled by 28 USC 636 (a) and (b). This court ruled in Raddatz v. U.S., 447 US 667 (1980) that a preliminary motion to suppress decided by a magistrate pursuant to 28 USC 636 (b) did not violate due process of the Fifth Amendment, and was not an improper delegation of authority, because the district judges maintained control of the case for trial.

The petitioner's case is distinguished from Raddatz infra in that the final decision was made by a magistrate who denied petitioner's motion to withdraw his guilty plea. The district judge affirmed without a de novo hearing and without viewing the petitioner or taking further evidence.

Since the Ninth Circuit has determined that Magistrates are not Article III judges, and that a decision by a magistrate is jurisdictional, and since the issue is unresolved in criminal cases and controversial at best in civil cases, this issue can only be resolved by this court granting the petitioner's Writ of Certiorari.

2. Unconstitutionality of Criminal Statute 26 USC 7203.

This Court should determine whether or not Congress has exceeded its

constitutional authority in enacting criminal statutes beyond the limitations imposed by the Unites States Constitution. A substantial federal question is raised by petitioner because he asserts that Congress has no authority to enact criminal legislation to enforce collection of an ordinary debt in the form of taxes.

Congress has violated the Tenth Amendment to the United States Constitution by enacting criminal statutes to enforce debt collection which is a right and remedy that has been left to the states and the people.

While various circuits have determined the constitutionality of 26 USC 7203 on other grounds, U. S. v. Ming, 466 F2d 1000 7th Circuit (1972) cert. denied 409 US 915, not void for vagueness, and no violation of right

against self-incrimination; also U. S. v. MacLeod, 436 F2d 947, (C.A. Mo. 1971) cert. denied 402 US 907, rehearing denied 402 US 990; the issue of the violation of the Tenth Amendment is unanswered.

Again petitioner does not contest the power of Congress to impose a tax on income, but on the power of Congress to enforce these laws by criminal sanction.

The power of the Congress to punish by crime must be express and not implied. Since there is no express provision of the Constitution allowing Congress to collect taxes by criminal statute, no implied right through Article I, Section 8, Clause 18 can exist.

Since the issue has not been decided by this Court, the substantial federal question remains whether Congress, by implied right, can consti-

tutionally enact criminal legislation to collect taxes.

3. Abuse of Discretion

The magistrate and trial court abused their discretion by denying petitioner's motion to withdraw his guilty plea, and thereby denied petitioner of a fair trial and due process of law pursuant to the Fifth and Sixth Amendments to the United States Constitution. The Court is clearly erroneous by failing to follow the tenets of Rule 11 of the Federal Rule of Criminal Procedure when the record reflects false assurances by petitioner's attorney.

A guilty plea is not voluntary if made in reliance on specific false assurances of counsel. U.S. v. Unger, 665 F2d 251 (8th Cir 1981); U.S. v. Goodman, 590 F2d 705 (8th Cir) cert. denied 440 US 985 (1979); McAleney v.

U.S., 539 F2d 282 (1st Cir. 1976); U.S. v. Marzgliano, 588 F2d 395 (3rd Cir. 1978).

A serious constitutional question arises when petitioner is denied the withdrawal of a guilty plea that was not voluntarily entered. Petitioner's attorney falsely led petitioner to believe that the maximum sentence for violation of 26 USC 7203 was thirty (30) days, not one year as the statute reads.

Substantial injustice has occurred and petitioner's rights of fair trial and due process have been violated because petitioner relied on the false assurances of counsel and entered his plea.

CONCLUSION

Substantial federal questions are raised by petitioner regarding the constitutionality of the United States Magistrates' Act when it allows the

Magistrate to make the final decision in criminal cases. Also a substantial federal question is presented regarding the power of Congress to enforce the collection of debt by criminal sanction, a right that remains in the States and with the people. Further abuse of discretion of the lower court and magistrate denying petitioner's motion to withdraw his guilty plea, deprives petitioner of constitutional guarantees. For these reasons petitioner prays that Writ of Certiorari be issued.

Respectfully submitted,

DEAN EDWARD LILLIE

Petitioner, pro se

Appendix A

DO NOT PUBLISH

UNOTED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DEAN EDWARD LILLIE,

Defendant-Appellant.

No. 83-3049

D.C. CR

82-60008-HJF

MEMORANDUM**

Submitted-October 18, 1983*

Decided-November 22, 1983

Appeal from the United States

District Court

for the District of Oregon

The Honorable Helen J. Frye, Presiding

Before: ANDERSON, POOLE, and NELSON, Circuit Judges.

We affirm the denial of defendant's motion to withdraw his guilty plea. Congress had the power to enact 26 U.S.C. §§ 7203 and therefore the district court properly had jurisdiction under 18 U.S.C. §§ 3231. The necessary and proper clause, Article I, §§ 8, Clause 18, provides Congress with the power to "make all laws...necessary and proper for carrying into execution the foregong powers," which include the power to tax found in Clause 1 of the same section. See SUNSHINE ANTHRACITE COAL CO. v. ADKINS, 310 U.S. 381, 393 (1940); LOGAN v. UNITED STATES, 144 U.S. 263, 283 (1892); UNITED STATES v. HALL, 98 U.S. 343, 346 (1879).

The district court did not abuse its discretion by denying defendant's

motion to withdraw his guilty plea. There is ample evidence developed in the hearing on defendant's motion to support the court's conclusion that Lillie's attorney acted reasonably in advising him to plead guilty in light of the charges facing him. No coercion is evident in the attorney's advice; rather, it appears to be the product of prudent counseling on the consequences if the plea bargain were not accepted. Simply, the record does not reflect that defendant did not understand the consequences of entering his guilty plea. See UNITED STATES v. RIVERA-RAMIREZ, 715 F. 2d 453, 458 (9th Cir. 1983).

AFFIRMED.

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 3(a).

** The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21, of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the FEDERAL REPORTER, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	No. 83-3049
	)	
vs.	)	D.C. No.
	)	
DEAN EDWARD LILLIE,	)	82-60008
	)	
Appellant,	)	ORDER
	)	

Before: ANDERSON, POOLE, and NELSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

Appendix C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee,	)	
	)	Civil No.
v.	)	
	)	CR 82-60008
DEAN EDWARD LILLIE,	)	
	)	OPINION AND
Defendant/Appellant.	)	
	)	ORDER

Dean Edward Lillie

P.O. Box 996

Ashland, OR 97520

Defendant/Appellant

Charles H. Turner, U.S. Attorney
James L. Suthurland, Asst. U.S. Attorney
Federal Building
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Eugene, OR 97401

Attorneys for Plaintiff/ Appellee

FRYE: Judge

Defendant Dean Edward Lillie appeals from a November 5, 1982 ruling of the Honorable Michael R. Hogan, United States Magistrate, denying his motion to withdraw his plea of guilty prior to sentencing.

FACTS

As a result of an investigation by the Internal Revenue Service (IRS), the Department of Justice authorized the United States Attorney for Oregon to prosecute Lillie for failure to file

corporate income tax returns for the years 1975, 1976, and 1977, and for failure to file individual income tax returns for the years 1976 and 1977. Lillie hired David Moore, an attorney and accountant knowledgeable about IRS prosecutions, to represent him. Moore, on behalf of Lillie, and the government entered into settlement negotiations. As a result of these negotiations the parties agreed that Lillie would plead guilty to a one-count information charging him with failing to file a corporate income tax return for 1977, and in return the government (1) would not prosecute Lillie for failing to file individual or corporate income tax returns for any of the years 1975 through 1980, inclusive; and (2) would not prosecute any members of Lillie's family for the same years; and

(3) would not issue any press releases of the proceedings involving Lillie.

On March 11, 1982, before Judge Hogan in open court, Lillie entered his plea as agreed. Judge Hogan questioned Lillie pursuant to Fed. R. Crim. P. 11. The record clearly indicates that Lillie's plea was voluntarily and knowingly made.

Some time later Lillie determined that he had a defense to the charge against him in that certain records that he needed in order to fill out his corporate income tax returns were in the hands of the State of Oregon and inaccessible to him. [1]

On August 20, 1982, Lillie filed a formal motion to withdraw his guilty plea, to which the government objected. [2] A preliminary hearing on the motion was held September 16, 1982 and an evidentiary hearing on October 14, 1982. By

the time of the September hearing, Lillie was no longer represented by counsel and was proceeding pro se.

In his order denying the motion for change of plea, Judge Hogan found that Lillie had not presented a plausible reason for withdrawing his plea. He found that although Lillie alleged that he was not guilty of the charge, he admitted not filing the return in question, and the defense put forth by Lillie related to documents not involving the tax year in question. Judge Hogan also found that the government did not breach the plea agreement and that the government would be prejudiced by the withdrawal of the plea because the statute of limitations had since expired on one of the charges it did not bring because of the plea. Judge Hogan found that the government had not coerced Lillie through

threats of prosecution of his family. Finally Judge Hogan found no evidence of incompetence or bad judgment on the part of Lillie's attorney.

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1. Lillie's attorney had known of this possible defense; however, he had been advised that the government had several witnesses willing to testify that the state had attempted to get Lillie to retrieve the records, but that Lillie had not done so.

2. Lillie apparently desired to change his plea sometime before July 15, 1982, but reconsidered.

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In this appeal Lillie is not entitled to a de novo adjudication of his motion; the decision of Judge Hogan must be upheld unless Lillie shows that the denial of his motion was an abuse of discretion. See United States v. Vasquez-Velasco, 471 F.2d 294 (9th Cir. 1973), cert. denied 411 U.S. 970 (1973). Although leave to change a plea before sentencing should be granted where there is a fair and just reason for doing so, the decision is committed to the sound discretion of the trial court. See United States v. Navarro-Flores, 628 F. 2d 1178 (9th Cir. 1980). The burden is on Lillie to show a plausible reason for the withdrawal of his plea. Id.

This court has examined the transcripts and the documents included in the record and cannot say that Judge Hogan abused his discretion in denying Lillie's motion. Lillie's primary contention on

this appeal is that he was "misrepresented" by his attorney, that his attorney "made no effort to advise him of his rights and the consequences of a waiver of those rights," and that his attorney pressured him to settle with the government to such an extent that his plea was in fact not voluntary. However, there is ample evidence in the record to support a finding by Judge Hogan that the recommendation by Lillie's attorney that Lillie accept the government's offer was a reasonable recommendation in light of the substantial charges facing Lillie, the evidence the government had against him, and the interest Lillie had in keeping his family free from prosecution and his business as unaffected by the proceedings as possible. Lillie paints a picture of his attorney as being "an

agent" of the government, attempting to coerce him into pleading guilty to a charge that Lillie knew in his heart he was not guilty of. The record appears to lend itself more to a picture of an attorney who attempted to negotiate a deal that assuaged as many of his client's concerns as possible.

Finally, a motion to change a guilty plea will not ordinarily be granted where prejudice to the government would result. Vasquez-Velasco, supra. Here, the government has lost the ability to prosecute one of its claims against Lillie because of the running of the statute of limitations. Judge Hogan was entitled to give weight to this factor in his consideration of Lillie's motion.

Because the ruling of Judge Hogan was not an abuse of discretion,

IT IS ORDERED that the November 5,

1982 decision of The Honorable Michael R. Hogan, United States Magistrate, denying defendant Dean Edward Lillie's motion for change of plea is AFFIRMED.

DATED this 7 day of April, 1983.

Helen J. Frye
United States
District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CR No.
	)	
vs.	)	82-60008
	)	
DEAN EDWARD LILLIE,	)	ORDER
	)	
Defendant.	)	

Defendant has moved to withdraw his guilty plea. The government opposes the motion.

On March 11, 1982, defendant pled

guilty in court to one count of failure to file a corporate tax return, 26 U.S.C. §§ 7203, and submitted a written plea petition which recounted his plea bargain with the government. Defendant reaffirmed his guilty plea in a subsequent hearing on July 15, 1982. On August 20, 1982, however, defendant moved to withdraw his plea. I held a motion hearing on September 16, 1982, and an evidentiary hearing on October 21, 1982, to develop the alleged grounds for defendant's requested withdrawal of plea.

In his statement of Grounds for Withdrawal of Guilty Plea, filed September 28, 1982, defendant asserts eight grounds for withdrawal of his plea:

(1) the guilty plea was not true;

(2) defendant's failure to file was not willful;

(3) the government has breached the

plea agreement;

(4) the government will not be prejudiced;

(5) defendant has the right to trial by jury;

(6) defendant has a conflict with his conscience about the plea;

(7) defendant has the right to indictment by a grand jury;

and

(8) defendant's attorney "mis-advised" defendant about the plea bargain.

I, II. TRUTH OF THE PLEA/
FAILURE TO FILE NOT WILLFUL

Defendant alleges that his guilty plea was "not true." In the written plea petition filed with the court at the guilty plea hearing on March 11, 1982, defendant stated:

> I was president and responsible officer of Rogue Logs, Inc., an Oregon Corporation, with its principal place of business in Rogue River, Oregon. The corporation was operated during the calendar year 1977 and it had income and expenses. Its corporate tax return was due by March 15, 1978. I have not filed that tax return with the Internal Revenue Service.

At the hearings on the current motion, defendant acknowledged the truth of this paragraph in his plea petition. He contends, however, that he is "not guilty" because a reasonable jury would accept his excuse for not filing and would acquit him. Defendant claims that he could not file his 1977 corporate tax return because the State Department of Revenue and State Employment Office had

possession of defendant's records. The government has provided the case record of the state revenue agent handling defendant's records, which shows repeated efforts by the revenue agent to contact defendant and repeated failure by defendant to respond or to retrieve his records. The revenue agent also testified to this effect at the hearing on this motion. Defendant contests the accuracy of this account, and argues that his wife, his accountant, and his attorney would testify that defendant made several efforts to retrieve his records. Although defendant's wife and accountant were available to testify, defendant did not call them as witnesses (defendant's previous attorney is in Europe).

Even if the state did have certain of defendant's records and defendant did make diligent eforts to retrieve them,

however, the records had little to do with Rogue Logs 1977 operations. The records in the state's possession comprised two check registers covering part of 1975 and 1976. Defendant did not explain where his 1977 records were at the time his return became due, and did not establish that the records held by the state were anything more than the 1975 and 1976 check registers. Defendant did not prove that these two registers were essential to preparation of his 1977 return. Defendant could have referred to the cancelled checks for those years, or could have obtained copies from his bank. Defendant maintains that the state's possession of these two check registers excused defendant's failure to file his 1977 corporate tax return, but I find from the record before the court that the records held by the state did not

prevent defendant from filing his 1977 return.

I have assumed for the sake of defendant's argument that defendant's proffered excuse is an actual defense to failure-to-file, which it is not. The law requires the filing of some return, even if incomplete or later amended or based on the roughest of records. The offense charged is the failure to file any return whatsoever, and defendant admits that he did not file the return.

III. BREACH OF THE PLEA AGREEMENT

Defendant claims that the government breached the plea agreement by disseminating more information to the press than that included in the public record. Defendant has provided copies of two newspaper clippings to support his claim. At the October 21, 1982 hearing, defendant conceded that the clippings contain only

information included in the plea petition, which is a public record of this court.

IV. NON-PREJUDICE TO GOVERNMENT

The government claims that it would suffer prejudice if defendant is allowed to withdraw his plea, because the statute of limitations has expired for charges concerning failure to file the 1975 individual and corporate tax returns. Defendant contends that 18 U.S.C. §§ 3280 would permit waiver of the limitation period. Section 3288 applies only to defects in the language of an indictment, not to a defendant's change of mind about a plea bargain. The section also applies only to indictments, not to an information. See Hattaway v. United States, 304 F.2d 5 (5th Cir. 1962). I find, therefore, that the government would suffer prejudice if defendant were permitted to withdraw his plea.

V. RIGHT TO TRIAL BY JURY

Defendant contends that he has a right to be tried by a jury. Defendant specifically waived that right when he signed his plea petition and pled guilty, and he has adduced no evidence to suggest that his waiver was not knowing and intelligent. Defendant's contention that a jury might acquit him because the state had certain of his business records was known to him at the time he pled guilty. Defendant's attorney testified at the October 21, 1982, hearing that he and defendant considered this possible defense in detail before the guilty plea. I find that defendant voluntarily waived his right to a jury trial at the time he plead guilty, and that he did so with full knowledge of his possible defenses at trial.

VI. CONFLICT WITH CONSCIENCE

Defendant contends that his attorney told him not to disclose a "conflict with his conscience" at the guilty plea hearing, because the court would possibly not accept the plea if it knew of the conflict. The conflict in question apparently relates to defendant's claim that he is not guilty and defendant's apprehension that the government might prosecute members of his family for tax related crimes. He states that he pled guilty to spare his family further "harassment."

According to defendant's attorney, the provision in the plea bargain prohibiting prosecution of defendant's family originated with the defense, not the government. The government did not, as defendant claims, threaten to prosecute defendant's family and thus

coerce defendant's plea. Instead, defendant proposed the non-prosecution provision during plea negotiations.

Defendant's motives for agreeing to a plea bargain do not automatically taint the voluntariness of the plea. A defendant usually has several motives for a guilty plea pursuant to a plea bargain, the primary one being relief from the prosecution of greater or other charges. In this case, defendant's attorney secured a very favorable plea bargain for the defendant. The evidence adduced at the October 21, 1982, hearing was that defendant had not filed tax returns from 1975 to 1980, either individually or for his various corporate entities, and the government could have prosecuted numerous counts of failure to file, each bearing a potential prison term of one year and a potential fine of $10,000.00. The plea

bargain reduced the potential charge to a single count. Aside from this potential in the possible charges, the government promised to limit its press releases and not to prosecute members of defendant's family who had not filed tax returns during the same years.

VII. RIGHT TO INDICTMENT BY A GRAND JURY

Violation of 26 U.S.C. §§ 7203 is a misdemeanor and may be charged by an information in lieu of grand jury indictment. United States v. Driscoll, 612 F.2d 1155 (9th Cir. 1980). The length of penalty is the most reliable index of whether a crime is "infamous," as the Fifth Amendment uses the term; the courts also consider the possibility of confinement in a penitentiary. See Mackin v. United States, 117 U.S. 348 (1886). Since a defendant sentenced to not more

than one year may not be confined in a federal penitentiary without his consent, 18 U.S.C. §§ 4083, violation of §§ 7203 does not involve a lengthy sentence nor confinement in a penitentiary. Under those circumstances, it is not an "infamous" crime under the Fifth Amendment and does not, therefore, require grand jury indictment before prosecution. Driscoll, supra.

VIII. MIS-ADVICE BY DEFENSE COUNSEL

At the hearings on the present motion, defendant stated that he does not allege "incompetence of counsel", only that his attorney "mis-advised" him about the consequences of his plea. Defendant states in his Statement of Grounds that his attorney's performance in a previous civil matter had undermined defendant's confidence in the attorney's legal abilty. Defendant did not develop much

proof about either claim at the hearings on the motion. Defendant alleges that his attorney should have advised him about "all" possibilities facing him, yet could not elaborate on what possibilities the attorney neglected to discuss. Defendant called his attorney as a witness in the October 21, 1982, hearing, and his attorney appeared knowledgeable, and cognizant of all facets of defendant's case. Defendant did not elaborate at all about the previous civil matter, either in his argument or in his questioning of his attorney.

Defendant's discontent with his attorney's representation apparently arises from defendant's belief that a jury would believe his excuse for failure to file and would acquit him. Any plea bargain, however favorable, is inferior to acquittal, and defendant apparently

believes that his attorney should have advised him to proceed to a jury trial where defendant would be acquitted. According to defendant's attorney, he and defendant discussed potential defenses in detail. Defendant's second thoughts about his decision to plead guilty do not make the attorney's representation incompetent or deficient.

IX. CONCLUSION

A defendant should be freely granted leave to withdraw his guilty plea whenever there is a fair and just reason for doing so. UNITED STATES V. NAVARRO-FLORES, 628 F.2d 1178 (9th Cir. 1980). The motion lies within the sound discretion of the trial court, United States v. Cook, 487 F.2d 963 (9th Cir. 1973), and defendant has the burden of presenting a plausible reason for his withdrawal of plea, Navarro-Flores, supra, citing Kercehval v.

United States, 274 U.S. 220, 224 (1927).

I find that defendant has not proved a plausible reason for withdrawal of his plea. He alleges that he is "not guilty," yet admits he did not file the tax return in question. He claims that the state had his tax records, yet the evidence reveals that these records were limited to partial check registers for 1975 and 1976, not the tax year for which defendant is charged. He claims that the government breached the plea agreement, yet concedes that the press releases contain no more information than that included in the public record. He argues that the government will not be prejudiced by the expiration of the limitation period on a potential charge, but I find otherwise. He asserts undue pressure by the government through threats against defendant's family, yet the evidence shows

that the non-prosecution promise originated with defendant, not the government, and that the other circumstances of the plea negotiations were essentially non-coercive, aside from the unavoidable coercion of pending charges. He asserts a right to trial by jury, which he voluntarily waived in entering a guilty plea, and a right to grand jury indictment, which does not apply to the misdemeanor offense in 26 U.S.C. §§ 7203. And, finally, defendant makes rather vague charges against his attorney, yet fails to show where and how his attorney provided bad advise, or anything more than defendant's belated difference of opinion with his attorney. I find none of defendant's reasons to be persuasive, and, therefore, deny the motion.

DATED this 4th day of November, 1982.

/s/ Michael R. Hogan
UNITED STATES MAGISTRATE

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Petition for Writ of Certiorari (3 copies) upon the Solicitor General, Department of Justice, Washington, D. C. 20530, on the 24th day of May, 1984 by mailing to said attorney a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, and deposited in the Post Office at Portland, Oregon, on said day.

DATED this 24th day of May, 1984.

DEAN EDWARD LILLIE
Petitioner, Pro Se